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Reports

ANDREW v. PUBLIC PROSECUTOR

[A. Cr. J. (Neal J.) July 5, 1961]

[Ipoh — Criminal Appeal No. 43 of 1961]

Road traffic — Vehicle under tow — Whether person at wheel of towed vehicle a "driver" — "To drive" — Meaning of — Road Traffic Ordinance, 1958, ss.36(1) and 146(1)(a) — Criminal Procedure Code (Cap. 6), s.321.

A bullock carter was driving his bullock cart along a road with the left hand wheel on the grass verge and the right hand wheel on the metal road when he was struck by a motor vehicle under tow steered by the appellant. The appellant stated in his evidence that at the time of the accident, the front vehicle overtook the bullock cart, that he could not see the bullock cart and that he knocked against it because there was not enough space. The appellant was charged and convicted for driving without reasonable consideration for other persons using the road under section 146(1)(a) of the Road Traffic Ordinance, 1958.

Held: (1) the appellant was a "driver" within the meaning of section 36(1) of the Road Traffic Ordinance;

(2) on the evidence, the appellant has failed to satisfy the Court that the decision was wrong in law or against the weight of evidence as required by section 321 of the Criminal Procedure Code;

(3) the words "to drive" are capable of a wide number of meanings dependent upon the context in which they are used and at its lowest could mean no more than steering a moving vehicle and that the actual meaning to be accorded to the word "driving" will vary in accordance with the actual provision of the law upon which the charge in any particular case is based.

Cases referred to:—

(1) *Wallace* v. *Major* [1946] K.B. 473.

(2) *Saycell* v. *Bool* [1948] 2 All E.R. 83.

(3) *Langman* v. *Valentine and Anor.*, [1952] 2 All E.R. 803.

(4) *Evans* v. *Walkden & Anor.* [1956] 3 All E.R. 64.

(5) *R.* v. *Kitson* (1955) 39 C.A.R. 66.

(6) *Floyd* v. *Bush* [1953] 1 All E.R. 265.

CRIMINAL APPEAL.

Chan Hua Eng for the appellant.

Abdul Hamid bin Omar (Deputy Public Prosecutor) for the respondent.

Cur. Adv. Vult.

Neal J.: The appellant was charged before the Magistrate, Ipoh on the following charge:—

"That you on 5.9.60 at about 5.30 p.m. at 3½ m.s., Ipoh Road Kg. Tawas, being the driver of WD Vehicle 48 RB 51 did drive the said vehicle on a road without reasonable consideration for other persons using the road and thereby committed an offence under section 36(1) and punishable under section 146(1)(a) R.T.O. 49/58."

After the hearing of the evidence for the prosecution and calling on defence, after finding there was sufficient evidence, and after hearing the evidence of the defence, the Magistrate on 10th April, 1961, convicted the appellant fining him the sum of $40 in default two weeks' imprisonment, and directed that his licence be endorsed with the conviction.

The appellant in his petition of appeal set out the following grounds of appeal:—

"(a) Your petitioner did not drive the vehicle in which your petitioner was as the vehicle was merely being towed by another vehicle.

(b) Your petitioner humbly submits that the learned Magistrate erred in law in that he did not take into account that your petitioner was not driving a motor vehicle as required by the Road Traffic Ordinance, but was merely following the route taken by the towing lorry.

(c) The conviction was contrary to law and against the weight of evidence."

Before me the appellant's counsel limited his appeal to the ground that the appellant was not driving a motor vehicle; but there was no express abandonment of the other grounds of appeal. The appellant relied upon the judgment of the Court of Appeal in England in *Wallace* v. *Major* (1) and, in particular, the statement of law by Lord Goddard C.J. at page 477, namely:—

"That ordinarily speaking, giving the ordinary meaning to the words in the English language, it is difficult to see how a person who is merely at the steering wheel of a car and having nothing to do with the propulsion of the car, having nothing to do with making the car go, is driving the vehicle."

The appellant also relied on the finding in law that a person at the wheel of a towed motor vehicle is not a driver.

The Deputy Public Prosecutor, on the other hand, relied upon the decision of the Court of Appeal in *Saycell* v. *Bool*(2) where the Court of Appeal presided over by Lord Goddard C.J. held that a person who had released the brake of a lorry standing at the head of an incline and steered it down the road was driving a motor vehicle contrary to section 7 of the Road Traffic Act, 1930 even though the engine had not been started and there was no petrol in the tank.

After a consideration of a large number of cases in which the word, "driving," has been construed in the English Courts and the respective provisions of the English Road Traffic Act, 1930 and the Federation of Malaya Road Traffic legislation, I have reached the conclusion, for

reasons which I shall set out in detail later, that except to ascertain the possible meanings to be given to the word, "driving," in the English language, the English authorities have very little if any application in the Federation of Malaya.

Dealing with the English authorities and commencing with the case of *Wallace* v. *Major, supra,* the respondent Major was charged with an offence against section 11 of the Road Traffic Act, 1930, namely, driving a motor vehicle in a manner which was dangerous to the public, and the Court of Appeal held that since he was merely steering a towed motor lorry at that time disabled he was not in law the driver of the motor vehicle. In *Saycell* v. *Bool, supra,* the respondent Bool was charged pursuant to section 74 of the same Road Traffic Act, 1930 with driving a motor vehicle while disqualified and was held by the Court of Appeal to have been properly convicted. The next authority that I have been able to find on the question of the meaning to be given to the word, "driving," in connection with motor vehicles is contained in *Langman* v. *Valentine and Another* [3], where an instructor holding the steering wheel and hand-brake whilst a learner controlled the other parts of the motor vehicle required for movement the Court of Appeal of which Lord Goddard C.J. was the President held that both the instructor and the pupil were drivers. In a reference to that case in a later case to which I shall refer, namely, *Evans* v. *Walkden and Anor.* [4], Lord Goddard C.J. said (and I think I must emphasise he was there speaking in relation to the English Traffic legislation):

> ".....and moreover I do not desire to be a party to any extension of *Langman* v. *Valentine* or any application of the decision in that case to facts which are not strictly in line with it and I think *Langman* v. *Valentine* went as far as it was safe to go; we felt in that case that there were facts on which we could not differ from the justices, though I think that we should have if we had felt able to do so."

The next authority that I have been able to find on the question of driving is the decision of the Court of Appeal in *Herbert Kitson* [5], where the appellant was held by the Court (which did not include Lord Goddard C.J.) in respect of a charge of driving a motor vehicle when under the influence of drink the facts upon which he was held to be properly convicted were that the appellant was a passenger in the front seat of the motor vehicle driven by his brother; that he went to sleep and woke up to find no one in the driver's seat and the vehicle moving of its own volition he grabbed the steering wheel but did not touch the handbrake or any part of the car which controlled the movement of the car as regards stopping or starting the car. He gave a good reason for not using the handbrake. It was held that by merely steering the car he had committed the offence of driving a motor vehicle while under the influence of alcohol. Reliance by the appellant was placed in that case upon the wording of Lord Goddard C.J. in *Floyd* v. *Bush* [6], when he said if he is driving the car, that is to say, causing the car to be moved without the consent of the owner he is committing an offence. The decision of the Court of Appeal in *Kitson's case, supra,* was reached notwithstanding that quotation of the law. As far as I can ascertain there was no express disapproval of the statement nor was *Floyd's case, supra,* distinguished; and, finally, the case of *Evans* v. *Walkden and Another, supra,* where Lord Goddard C.J. presided and agreed with the first judgment delivered by Ormerod J. The respondents in that case were charged in respect of an offence against section 35 of the Road Traffic Act, 1930 and the Court held that on the facts, namely, that the first respondent seated in the passenger seat of the car alongside his son in the driver's seat who had no licence was not the driver of the car at the time although he was in a position to assume the control of the car he was not actually in control.

From those authorities I have reached the conclusion that in the English language the words, "to drive," are capable of a wide number of meanings dependent upon the context in which they are used and at its lowest could mean no more than steering a moving vehicle, and that the actual meaning to be accorded to the word, "driving," will vary in accordance with the actual provision of the law upon which the charge in any particular case is based. A consideration of the two enactments so far as the question which I am asked to determine is concerned show the following differences. In section 2 "driver" in the Federation is defined as meaning a person for the time being driving a motor vehicle. Section 121 of the English Act provides that where a separate person acts as steersman of a motor vehicle, includes that person as well as any other person engaged in the driving of the vehicle, and the expression "drive" shall be construed accordingly. *Wallace* v. *Major* held that the operative words were "a vehicle" and meant two persons in control of the same vehicle.

Motor vehicle is defined in the Federation by the same section as every description of vehicle propelled by means of mechanism contained within itself and constructed or adapted so as to be capable of being used on roads, and includes a trailer. And trailer in the same section is defined as vehicle other than land implements drawn by a motor vehicle, whether or not part of the trailer is superimposed on the drawing vehicle. In the English Act there is no actual definition of these two terms but in section 1 there is provision that the Act applies to all mechanically propelled vehicles intended or adapted for use on roads (in this Act referred to as "motor vehicles") and to vehicles (in this Act referred to as "trailer") drawn by motor vehicles.

"Vehicle" has been defined in the Federation by the same section as meaning a structure capable of moving or being moved or used for the conveyance of any person or thing and which maintains contact with the ground when in

motion. There is no similar provision in the English Act apart from the reference in section 1.

Section 4(1) of the Federation Ordinance provides, *inter alia*, for the purposes of this Ordinance and the rules made thereunder, motor vehicles shall be divided into the following classes; and thereafter amongst other things is included the provision as regards trailers to which I have referred. The equivalent section is section 2 of the English Act and it makes no similar reference in the equivalent section to "trailers."

Section 25(1) of the Federation Ordinance provides as follows:—

"Except as otherwise provided in this Ordinance no person shall drive a *motor vehicle of any class* or description, on a road unless he is the holder of a driving licence authorising him to drive a motor vehicle of that class or description, and no person shall employ or permit another person to drive a motor vehicle on the road unless the person so employed or permitted to drive is the holder of such a driving licence."

Section 4(1) of the English Act (the nearest approach I can find to our section 25) reads as follows:—

"A person shall not drive a *motor vehicle* (which according to section 2 does not include a trailer) on a road unless he is the holder of a licence, and a person shall not employ any person to drive a motor vehicle on a road unless the person so employed is the holder of a licence, and if any person acts in contravention of this provision, he shall be guilty of an offence."

In my opinion, it must be noted — and I think emphasised — that in England under section 4 the legislature has not insisted upon a driving licence being held by a person in charge of a trailer whereas in the Federation since a trailer (and, in this case, the towed vehicle) is clearly within the stipulated classes of motor vehicle a *licence to drive* under section 25 is necessary. The Federation Legislature has made it clear that it is their intention that the term, "driving," should include control of a trailer and, as far as I can advise myself, the only possible control of a trailer is by steering.

The point which I make is, in my opinion, emphasised by section 17(2) of the English Act which reads:—

"Where a motor vehicle other than a heavy locomotive or a light locomotive is drawing a trailer or trailers on a highway, *one person, in addition to the driver* of the vehicle, shall be carried either on the vehicle or on a trailer *for the purpose of attending* to the trailer or trailers."

So far as my research is concerned, I can find no equivalent provision in the Federation legislation to section 17(2) and on that point alone the reasoning in *Wallace* v. *Major* is not applicable in the Federation. I would emphasise that section 17(2) is making the distinction between the driver of the towing vehicle as opposed to the attendant on the vehicle towed. I have searched not only in the legislation itself but in the subsidiary legislation to find if there is any similar provision. I can trace only one reference, namely, in rule 119 of the Motor Vehicles (Construction and Use) Rules, 1959 where both the driver of the towing and towed vehicles are referred to as the person in charge of each of the particular vehicle so that even if reference is to be made to the subsidiary legislation, the correctness of which reference I doubt, it is still clear that there is no distinction such as is made by section 17(2). Whilst I am dealing with the subsidiary legislation, I have not overlooked that certain of the subsidiary legislation, namely, the Road Traffic Rules, 1959 does define "driving." I have derived no assistance from that definition. I have considered it though I am of the opinion that since there is no ambiguity in the Ordinance itself it is not open to me to use the subsidiary legislation for construction of the Ordinance and even though I am of the opinion that it is extremely doubtful whether that definition is *intra vires* the rule making powers. I have reached the conclusion therefore that the word, "driving," is to be given a meaning in each section consistent with the range of definitions to which I have referred in discussing the English authorities, and that a person steering a moving vehicle may for certain purposes be driving it. In my opinion, the test is: was it the particular control proved that caused the breach of the law complained of? To illustrate that point it is obvious that a steersman of the vehicle cannot be held liable for an offence of driving at a speed. As to whether he could drive recklessly or dangerously or with due care and attention, that still depends, in my opinion, entirely on whether it was the control being exercised by the person in charge which caused the breach of the law. I can envisage in a case of a driver of a towed vehicle where the towing vehicle is behaving normally being guilty of reckless or dangerous driving where within the limits of the tow the steersman of the towed vehicle was causing that vehicle to travel violently from side to side. Before I leave *Wallace* v. *Major*, apart altogether from the reasons which I have given for holding that authority not applicable in this country, having regard to the legislation in the Federation, it is to my mind important to consider the *ratio decidendi* in *Wallace* v. *Major*, namely, that every person in England would be guilty of a breach of the law because he could not have full control over the vehicle or retain a full view of the road and traffic ahead. I can find no equivalent provision in the Construction and Use Regulations in force in this country and, in fact, there is an express authority which would excuse a person from that responsibility in the provision in regulation 119 limiting the length of the rope chain or bar used for towing to 15 feet. I have reached the conclusion therefore that the appellant was the driver within the meaning of section 36(1) of the Road Traffic Ordinance, and I now proceed to deal with the question of whether or not the evidence established the offence but before doing so I think attention should be drawn in the light of what I have said earlier about *Wallace* v. *Major* and the distinctions between the two sets of legislation to the fact that in section 11 of the

English Act the legislature has seen fit to include in the one section the offences of driving recklessly or at a speed or in a manner that is dangerous and, in my opinion, *Wallace* v. *Major* must be read bearing that point in mind.

I find some support for the view that I have taken in the following words of Lord Goddard C.J. in *Wallace* v. *Major, supra,* at page 477 when he said:—

"Of course, it might be that in such a case both would be liable. If the driver who is responsible for the safety of the vehicle was driving it at an excessive speed he may properly be prosecuted for proceeding at an excessive speed; if, on the other hand, the negligent driving was caused by the negligent steering of the vehicle, then it is thought that the steersman would be a person to be regarded equally as a driver (his Lordship was referring to the English Act)."

Of course, it must be appreciated that the standard of due care and attention or alternatively reasonable consideration for other road users must, in the case of the driver of a towed vehicle, carry different considerations to those applicable to the driver of a single vehicle. It will have to be borne in mind that he has a limited field of vision. This consideration may in certain circumstances limit the standard. On the other hand, it being a factor which should have been well within his knowledge it may in certain other circumstances require a higher standard of attention. In my opinion having regard to the extremely limited field of vision on the left hand side the driver of a towed vehicle is placed under a duty to ensure that he is following the tracks of the vehicle which is towing him if not moving on a course slightly to the right of the towing vehicle to maintain a field of vision in respect of oncoming traffic.

In dealing with this appeal I am bound by the mandatory provisions of section 321 of the Criminal Procedure Code (Cap. 6) which provide that I shall not interfere with the decision of the Court below in this case unless, *inter alia,* I am satisfied that the decision is wrong in law or against the weight of evidence. From what I have said earlier I am not satisfied that it was wrong in law and, in my opinion, it was correct in law. As to whether it was against the weight of evidence, I would at this stage emphasise that the word used by the legislature is "satisfy." This, to my mind, must mean satisfied on evidence that might reasonably be true when an accused is the appellant.

Before considering the evidence as recorded I would point out (although the point was never taken before me) that there are two pieces of evidence which, in my opinion, were wrongfully admitted. The first appears in the cross-examination of the police investigating officer when he stated the defendant admitted that he was the driver of the front truck. This statement was made to the police obviously after investigation commenced and is prohibited by virtue of section 113 of the Criminal Procedure Code. For the same reason in re-examination of the appellant the production of his report which was made at 8.20 p.m. on the day in question was also inadmissible since the investigating officer deposes to receiving information at 6.30 p.m. and the prosecution witnesses report of the alleged offence was made at 6.25 p.m. Having regard to section 321 these two items of evidence must be omitted from my considerations and I do so accordingly.

The prosecution evidence which on the facts was not seriously challenged in cross-examination was that of a bullock carter who deposed that on the day in question at about 5.30 p.m. he was driving his bullock cart along the road in question with the left hand wheel on the grass verge and the right hand wheel on the metal road when he was struck by a motor vehicle under tow and that the appellant had admitted to him that he was the driver of the vehicle which hit the bullock cart. According to the investigating officer who produced the plan the road was comparatively straight up to the point where the bullock cart was found by him. There was no suggestion that it had been moved. That evidence carries with it the only possible inference that at the point of impact the vehicle driven by the appellant must have been travelling more to the left of the vehicle that was towing him. In my opinion, at the end of the prosecution case, the prosecution had, having regard to that particular fact, established that the appellant was not only driving without the due care and attention which, in my opinion, is required of the driver of a towed vehicle, but also was driving without reasonable consideration for any other person using as he is entitled to use and bound to use so far as traffic proceeding in the same direction is concerned the left hand side of the road. The appellant gave evidence and the relevant portion of his evidence reads:—

"On 5.9.60 I was in the rear vehicle that was being towed. The front vehicle tried to overtake. The bullock cart appeared and I swerved to the right. The tow was attached to a steel bar. I could not see the bullock when the front vehicle overtook the bullock cart."

And in cross-examination:—

"At the time of the accident we were coming down a slope. The first vehicle passed safely. My vehicle went and knocked against the bullock cart because there was not enough space."

The only possible explanation which could, in my opinion, have absolved the appellant was that the towing vehicle had suddenly and without warning changed course and he hit this bullock cart before there was time for him to have adjusted the course of his own vehicle. There was no evidence of any such suggestion. Knowledge of those facts must of necessity be with the appellant. In addition, I would point out that the evidence of the appellant makes it abundantly clear that he had the ability to move his vehicle from right to left. The appellant therefore has failed to satisfy me within the meaning of section 321 of the Criminal Procedure Code. In fact, I have reached the conclusion that so far from being satisfied that the Magistrate was

wrong in holding that he was driving without due consideration for other road users, I am for the reasons which I have stated satisfied that he could not on the evidence have reached any other conclusion.

The appeal as regards conviction must therefore be dismissed. No ground was put forward before me that the fine was in any way excessive. Whilst it is doubtful having regard to the petition of appeal whether the appellant was appealing against his sentence as well I have considered this matter, and I see no reason for interfering with the sentence. It cannot, in my opinion, be said that a fine of $40 imposed was in any way excessive.

Appeal dismissed.

Solicitors: *Drew & Napier.*

PUBLIC PROSECUTOR v. ROSS

[A.Cr.J. (Ismail Khan J.) July 15, 1961]

[Seremban — Criminal Appeal No. 3 of 1961]

Machinery — Operation of rubber sheeting machine — No certificate of fitness — Machinery Ordinance, 1953, s.6(1) and (2) — Notice under s.6(2) — Mens rea.

In this case a weeder who was feeding rubber into the rollers of a rubber sheeting machinery sustained injuries on his fingers. There was no certificate of fitness issued in respect of the said machinery as required by section 6(1) of the Machinery Ordinance. The respondent, the manager of the rubber estate, was charged with contravening section 6(1) an offence punishable under section 35 of the said Ordinance.

Held: (1) to attract the operation of section 6(1) it is not necessary that a notice should have been issued under section 6(2) of the said Ordinance;

(2) the prohibition contemplated by section 6(1) of the Ordinance is an absolute one and there is no obligation on the prosecutor to prove *mens rea.*

Cases referred to:—

(1) *Mousell Bros. Ltd.* v. *London and North Western Railway Co.* [1917] 2 K.B. 836, 845.

(2) *Ong Aik Phow* v. *Rex* [1937] M.L.J. 73.

(3) *R.* v. *G.H. Kiat* [1938] M.L.J. 150.

(4) *Public Prosecutor* v. *Ong Cho Teck* [1946] M.L.J. 85.

CRIMINAL APPEAL.

Wan Suleiman bin Pawan Teh (Deputy Public Prosecutor) for the appellant.

Atma Singh Gill for the respondent.

Ismail Khan J.: The respondent was charged before the learned Magistrate, Port Dickson, as follows:—

"That you on 24th day of October, 1960 at about 12.00 noon being the Manager of Sengkang Rubber Estate, Port Dickson, in the State of Negri Sembilan did permit a continuous rubber sheeting machine which is a machine for which a certificate of fitness is prescribed to be operated without such certificate of fitness being in force contrary to section 6(1) of the Machinery Ordinance, No. 18 of 1953 and punishable under section 35(1) of the aforesaid Ordinance."

The learned Magistrate acquitted and discharged the respondent without calling for the defence as there was no evidence that the respondent had permitted the machine to be operated or had knowledge that it was being operated. Against this acquittal the Public Prosecutor has appealed on the ground that the learned Magistrate was wrong both in law and in fact in holding that there was insufficient evidence that the respondent had permitted the machine to be operated.

The facts are that on 24th October, 1960, at a rubber factory on the Sengkang Rubber Estate, of which the respondent was the manager, a rubber sheeting machinery was being operated by an employee of the estate P.W.2, an engine driver, with the assistance of P.W.1, a weeder, who was feeding rubber into the rollers of the machine. During the operation P.W.1 sustained injuries to his fingers. According to P.W.3, a machinery assistant, there was no certificate of fitness issued in respect of the said machinery on the said date. Indeed, there was no such certificate as from 5th October, 1959. The principle to be followed in this case is stated by Atkin L.J. in *Mousell Bros. Ltd.* v. *London and North Western Railway Co.*[1], at page 845:—

"I think that the authorities cited by my Lord make it plain that while *prima facie* a principal is not to be made criminally responsible for the acts of his servants, yet the Legislature may prohibit an act or enforce a duty in such words as to make the prohibition or the duty absolute; in which case the principal is liable if the act is in fact done by his servants. To ascertain whether a particular Act of Parliament has that effect or not regard must be had to the object of the statute, the words used, the nature of the duty laid down, the person upon whom it is imposed, the person by whom it would in ordinary circumstances be performed, and the person upon whom the penalty is imposed."

The same principle has been adopted in the following cases: — *Ong Aik Phow* v. *Rex* [2], *Rex* v. *G.H. Kiat* [3], *Public Prosecutor* v. *Ong Cho Teck* [4].

Section 6(1) of the Machinery Ordinance reads as follows:—

"No owner or other person, without the authority in writing of a Senior Inspector, shall operate or permit to be operated any machinery in respect of which a certificate of fitness is prescribed unless such certificate has been duly issued, and is in force."

Section 35(1) reads as follows:—

"Any person who shall contravene the provisions of section 6, sub-section (1) of section 13, section 14, sub-section (3) of section 15, sub-section (1) of section 17, section 25, or section 34 shall be liable to a fine of two thousand dollars and any person who shall contravene the provisions of section 8, section 9, sub-section (1) of section 15, section 28 or section 29 shall be liable to a fine of one thousand dollars and any person who shall contravene any other provision of this Ordinance for which contravention no penalty is provided shall be liable to a fine of five hundred dollars and in the case of a continuing offence to a fine of twenty-five dollars for each day or part of a day during which the offence continues after the first day on which a conviction is had."

Section 6(2) empowers an inspector of machinery to issue a notice prohibiting the operation of the said machinery until a certificate of fitness is issued. It is not however necessary to attract the operation of section 6(1) that such